No. 87-6026
No. 87-5666
87-5765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSE MARTINEZ HIGH,
Petitioner,
vs.
WALTER ZANT, WARDEN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

HEATH A. WILKINS,
Petitioner,
vs.
STATE OF MISSOURI,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Missouri

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Brief for Amicus Curiae International Human Rights Law Group in Support of Petitioners

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September 2, 1988

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BRIEF OF INTERNATIONAL HUMAN RIGHTS LAW GROUP

INTEREST OF AMICUS

Amicus Curiae International Human Rights Law Group has obtained the written consent of the parties to file this brief.[1/]

The International Human Rights Law Group ("Law Group") is a non-profit public interest organization incorporated in the District of Columbia. Its goals include the development and promotion of legal norms of international human rights. To that end, the Law Group has represented

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1/ The parties' letters of consent to the filing of this brief are being filed with the Clerk of Court pursuant to Rule 36.2 of the Rules of this Court.

individuals and organizations, on a pro bono basis, before United States and international tribunals.

With respect to the execution of juvenile offenders in the United States, the Law Group submitted an amicus curiae brief in Thompson v. Oklahoma, _____ U.S. ___, 108 S. Ct. 2687 (1988), in which the Court vacated the death sentence for a crime committed when the defendant was 15. Representatives of the Law Group have testified in opposition to juvenile capital punishment before Congress, and the Law Group co-sponsored a petition challenging the practice before the Inter-American Commission on Human Rights.

In Thompson, this Court found that in some circumstances the execution of juveniles violates the Eighth Amendment to the Constitution. The Law Group

respectfully submits and intends to demonstrate that execution of any person under the age of 18 offends internationally-accepted standards of decency and thereby violates the Eighth Amendment to the Constitution. Such executions also violate treaties signed by the United States and rules of customary international law binding on the United States.

STATEMENT OF THE CASES

Petitioner Jose Martinez High was found guilty of capital murder, armed robbery, kidnapping, aggravated assault and possession of a firearm by a jury in Taliaferro County, Georgia on December 1, 1978. On the same day, he was sentenced to death.

The State's evidence showed that on the night of July 26, 1976, High and

two accomplices robbed a gas station attendant at gunpoint, then kidnapped him along with his eleven-year-old stepson. High and the others drove the victims to a remote place and shot them. The attendant survived; his son died. The case has been reviewed numerous times. The Supreme Court of Georgia and the U.S. Court of Appeals for the Eleventh Circuit have upheld the death sentence.

The acts described above occurred when High was 17 years of age. Under Georgia law, although the age of majority for most purposes is 18, persons are treated as adults at age 17 under the criminal code. Georgia law prohibits executions of persons under the age of 16, and thus, unlike the Thompson case, the state law clearly permits the execution of Jose Martinez High.

Petitioner Heath A. Wilkins pleaded guilty to first degree murder on May 9, 1986, in the Circuit Court of Clay County, Missouri. Wilkins admitted involvement in the murder of a liquor store clerk on July 27, 1985. The court sentenced him to death on June 27, 1986. His case was appealed to the Missouri Supreme Court which upheld the death sentence.

Wilkins committed the murder when he was 16 years and 7 months old. Under the Missouri criminal code, 17 year olds are treated as adults, but people as young as 14 may be certified for trial as adults. Wilkins was so certified. The adult criminal code in Missouri has no minimum age for capital punishment.

SUMMARY OF ARGUMENT

In Thompson v. Oklahoma, a plurality of this Court held that the execution of any person who committed a crime while under the age of 16 violates the Eighth Amendment to the Constitution. Under the same analysis as that employed in Thompson, this Court should find that execution of any person for a crime committed when he was under the age of 18 also violates the Eighth Amendment. Moreover, such executions violate treaty obligations of the United States, as well as its obligations under customary international law.

Part I of this brief discusses the Eighth Amendment's prohibition on cruel and unusual punishment as set forth in Thompson. Although the Justices were divided as to the proper holding in

Thompson, they agreed on the proper approach to analyzing the Eighth Amendment. The Justices agreed that the Court must assess "evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958).

The plurality recognized the level of international consensus as one of the standards to consider in evaluating the constitutionality of a punishment in this country. Similarly, how the United States provides for the human rights of its own citizens is properly the concern of other civilized nations. If the United States fails to recognize those concerns it may find it is violating human rights obligations. At the least, it may find it does not maintain as high a standard of

human rights as those states it most respects.

In widely-adopted treaties and international practice cited by the Thompson plurality, 18 rather than 16 is the age that other nations agree is the acceptable minimum. Similarly, in widely-adopted resolutions of inter-national organizations, persons who commit crimes under the age of 18 are not subject to capital punishment. The United States has participated in the debates regarding adoption of these resolutions and has signed several human rights treaties with-out objecting to the prohibition on executing persons for crimes committed under age 18.

In Part II of the Brief, Amicus discusses the United States' international legal obligations relevant to capital

punishment for persons who commit crimes while under the age of 18. The International Covenant on Civil and Political Rights and the American Convention on Human Rights forbid, in all circumstances, execution of persons under 18 at the time of their offense. The United States has signed these two treaties. International law requires that a signatory may not undermine the objectives and purposes of a treaty pending its ratification. Execution of petitioners will undermine the objectives and purposes of treaties forbidding such executions. Consequently, the United States may not execute petitioners.

Even if the United States were not a signatory to these Conventions, customary international law would forbid the execution of petitioners. By now,

widespread practice combined with the predominant view that nations are bound to forbid the execution of juvenile offenders has effectively created a rule of customary international law. This international law is part of United States law and is superior to the laws of the several states. Therefore, the United States' treaty obligations and the rules of customary international law prohibit the execution of petitioners High and Wilkins because both were under the age of 18 when they committed their respective crimes.

ARGUMENT

I. Objective Standards of Decency Established by the International Community Prohibit the Execution of Juvenile Offenders.

In Thompson v. Oklahoma, ____ U.S. ____, 108 S. Ct. 2687 (1988), the plurality held that execution of a person for a crime committed when he was under the age of 16 violates the Eighth Amendment's prohibition of cruel and unusual punishment. The plurality expressly stated that it had not resolved the issue whether execution of a person for a crime committed below the age of 18 would also violate the Constitution. Id. at 2700. This question, among others, is now before the Court as it considers the instant cases. In both cases, the petitioners face the death sentence for crimes

committed when they were over the age of 16 but under the age of 18; further, in Georgia, such executions are clearly permitted by that jurisdiction's statutory law.

In Thompson, the eight Justices agreed that the key to Eighth Amendment analysis is to examine "evolving standards of decency" in society. Among the standards relied on by the plurality and by the Court in past cases are those established by the international community. With regard to juvenile execution, the international community has reached a consensus that execution of persons who committed crimes while under the age of 18 offends civilized standards of decency.

A. Eighth Amendment Analysis Requires Objective Assessment of Social Evolution.

In Thompson, all the Justices agreed that Chief Justice Warren's opinion in Trop v. Dulles, 356 U.S. 86 (1958) (plurality opinion) sets forth the applicable standard for Eighth Amendment analysis:

> The authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishments, but they made no attempt to define the contours of that category. They delegated that task to future generations of judges who have been guided by the 'evolving standards of decency that mark the progress of a maturing society'.

Thompson at 2691 (Stevens, J., quoting Trop at 101); see also Thompson at 2706 (O'Connor, J., concurring); Thompson at 2714, (Scalia, J., dissenting).

Justice Scalia pointed out that the difficulty of assessing societal standards is that "it is all too easy to believe that evolution has culminated in one's own views." Thompson at 2715 (Scalia, J., dissenting). He advises, therefore, that the Court look to "objective" standards when assessing social evolution: "To avoid this danger [of subjectivity] we have, when making such an assessment in prior cases, looked for objective signs of how today's society views a particular punishment." Thompson at 2715, citing Furman v. Georgia, 408 U.S. 238, 277-79 (1972) (Brennan, J., concurring). Amicus agrees that this approach requires the assessment of objective societal standards, among which are the standards of the international community.

B. International Consensus Provides an Objective Sign of Social Evolution.

In looking for an objective sign of social evolution, the Thompson plurality examined the practice of American state legislatures and juries regarding the execution of persons below the age of 16. Equally significant, the plurality expressly considered the standards of the international community:

> The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community. Thus, the American Bar Association and the American Law Institute have formally expressed their opposition to the death penalty for juveniles. Although the death penalty has not been entirely abolished in

> the United Kingdom or New Zealand (it has been abolished in Australia, except in the State of New South Wales, where it is available for treason and piracy), in neither of those countries may a juvenile be executed. The death penalty has been abolished in West Germany, France, Portugal, The Netherlands, and all of the Scandinavian countries, and is available only for exceptional crimes such as treason in Canada, Italy, Spain and Switzerland. Juvenile executions are also prohibited in the Soviet Union.

Thompson at 2696 (emphasis added). In a footnote the plurality states:

> In addition, three major human rights treaties explicitly prohibit juvenile death penalties. Article 6(5) of the International Covenant on Civil and Political Rights; Article 4(5) of the American Convention on Human Rights; [and] Article 68 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

Thompson at 2696 n.34, (citations omitted; emphasis added). Thus, the Thompson

plurality followed several prior cases where the Court stated that "international opinion" is among the "objective factors" which should inform the Court's analysis of the Eighth Amendment. See Emmund v. Florida, 458 U.S. 782, 788 (1982); Coker v. Georgia, 433 U.S. 584, 592, 596 n.10 (1977); Trop v. Dulles, 356 U.S. 86, 102 (1958).[2/]

The collective views of the majority for nations offer objective

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2/ Despite this past precedent, Justice Scalia argues that international opinion is not relevant to Eighth Amendment analysis. "[R]eliance upon . . . civilized standards of decency in other countries . . . is totally inappropriate as a means of establishing the fundamental beliefs of this nation." Thompson at 2716 n.4. Justice Scalia offers no rationale for his radical departure from the Court's precedent. Moreover, this rejection of international standards is plainly inconsistent with his own admonition to look to objective standards outside the subjective opinions of the Justices.

criteria for evaluating domestic norms that are based on broader experience and reflection than the perspectives that we associate with juries and state legislatures in our own country. The Court has taken the position that looking to international standards helps alleviate Justice Scalia's expressed concerns relating to objectivity in discovering the standards of "civilized society."

Over the last 40 years, nations have adopted numerous human rights treaties and declarations to establish external standards for all states to observe. It is now accepted that countries should measure the treatment of their own citizens by international

standards.[3/] The Court has had good reason, therefore, for considering international opinion in the past and is similarly justified in looking to the international consensus on the issues presented in this case.

C. International Standards of Decency Prohibit the Execution of Juveniles.

The development of our society with respect to standards of decency parallels the evolution in international society. Slavery and other gross violations of human rights were once tolerated; yet, they are tolerated no longer. International society has reached a consensus

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3/ See L. Henkin, The Internationalization of Human Rights, Proceedings of the General Education Seminar, Vol. 6, No. 1 (Fall 1977) reprinted in part in Henkin, Pugh, Schachter, & Smit, International Law, at 984-96 (1987).

that no one may be executed for a crime committed when he was under 18. This consensus is reflected in the practice of nations, the signing and ratification of treaties, widely adopted resolutions of international organizations, and in the laws of various nations.

1. Treaties

Treaties are generally the best evidence of an international consensus. States do not simply express their views in treaties, but rather they bind themselves to specific obligations. The vast majority of states have affirmatively bound themselves in various international treaties not to execute persons for crimes committed when they were under the age of 18. As noted, the plurality in Thompson cited three such treaties which demonstrate the international consensus opposed

to juvenile executions. Supra p. 16. Justice O'Connor also acknowledged international opposition to juvenile execution. See Thompson at 2707-08 (O'Connor, J., concurring).

Significantly, the treaties cited by the five justices prohibit the execution of persons who committed crimes while they were under the age of 18. The first treaty cited by the plurality is the International Covenant on Civil and Political Rights which states in Article 6(5) that no person may be executed for crimes committed below 18 years of age.4/ No

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4/ See supra p. 16. "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women." International Covenant on Civil and Political Rights, annex to G.A. Res. 2200, 21 U.N. GAOR Res. Supp. (No. 16)

(footnote cont'd)

exceptions are cited. This Covenant has been signed by 58 nations, including the United States -- of the 58 signatories 50 have ratified the Covenant. An additional 36 states have pledged to adhere to the provisions of the Covenant, although these countries are not signatories.[5/]

The travaux préparatoires show that during negotiations no state opposed Article 6(5).[6/] Indeed, the drafters

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at 53, U.N. Doc. A/6316 (1966) (signed but not ratified by the United States) reprinted in 6 I.L.M. 368, 370 (1967).

5/ Information on countries who have signed, ratified, or pledged to adhere to the International Covenant on Civil and Political Rights was obtained through a telephone interview from the United Nations Information Centre.

6/ See J. Hartman, "Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty, 52 U. Cin. L. Rev. 655, 671-72 (1983).

considered Article 6(5) to be a codification of existing law.[7/] Similarly, the United States did not object to the article during the negotiation process or set forth any reservations to this provision when it signed the Covenant. The United States supported a U.N. General Assembly Resolution that included Article 6 as a "minimum standard" binding on all Member States whether or not they are parties to the Covenant.[8/]

The second convention cited by the plurality, the American Convention on Human Rights, also forbids capital punishment for crimes committed by anyone under

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7/ Id.

8/ Id. at 681 n.94; G.A. Res. 35/172, U.N. GAOR Supp. (No. 48) at 195, U.N. Doc. A/35/48 (1980).

18.[9] Sixteen States have ratified this treaty. Another three have signed the Convention, including the United States. An additional four states have pledged to follow the Conventions' provisions.[10] Again, the United States did not object to the inclusion of this prohibition in the Convention.[11]

9/ See supra p. 16. "Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women." American Convention on Human Rights, No. 22, 1969, art. 4(5), O.A.S. Off. Rec. OEA/Ser. L/V/II. 23, doc. 21, rev. 2 reprinted in 9 I.L.M. 673, 676 (1970).

10/ Information on countries who have signed, ratified, or pledged to adhere to the American Convention on Human Rights was obtained through a telephone interview from the United States Department of State.

11/ Observations and Proposed Amendments to the Draft of the Inter-American Convention on the Protection of Human Rights, T. Buergenthal and R.

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Finally, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War specifically forbids the execution of any person for an offense committed while under 18 for any reason.[12/] The United States and 154 other nations are parties to the Geneva Convention on the Protection of Civilian Persons in Time of War.[13/] Although this Convention applies during time of war, a

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(footnote cont'd)

Norris, The Inter-American System, Booklet 13, at 152 (1982).

12/ See supra p. 16. "[T]he death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence." Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, art. 68, para. 4, 6 U.S.T. 3516, 3560, T.I.A.S. No. 3365, 75 U.N.T.S. 287, 330.

13/ Information on the number of parties to the Geneva Convention was obtained from the United States Department of State. See note 5, supra.

standard equally solicitous of the sanctity of youthful life should certainly apply in time of peace. The United States signed and ratified this Convention without asserting opposition to the prohibition prohibition of juvenile executions.[14/] Thus, in the earliest stages of the formation of the consensus, the United States failed to mount any

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14/ The only statement made by the United States regarding Article 68, para. 4 of the final version came during a Committee meeting at the Diplomatic Conferences in Geneva. The United States delegate stated the abolition of the death penalty in the case of protected persons under 18 years of age was a matter which called for very careful consideration before such a sweeping provision was adopted. Comment by Mr. Ginnane, in 19th Mtg, Committee III, May 19, 1949, in Final Report of the Diplomatic Conference of Geneva, Federal Political Department, Berne, n.d. Vol. II, § A, at 673.

opposition to the rule excluding juvenile offenders from punishment by death.[15]

2. Resolutions of International Organizations

In addition to the three treaties cited by the plurality in Thompson, there is other evidence of the international consensus forbidding execution of anyone under 18 when a crime was committed. The U.N. Economic and Social Council (ECOSOC) has adopted a resolution providing safeguards relating to the death penalty, one of which prohibits the execution of persons who committed crimes when they were under the age of 18

15/ 27th Plenary Mtg, Committee III, Aug. 3, 1949, in Final Report of the Diplomatic Conference of Geneva, Federal Political Department, Berne, n.d., Vol. II, § B, at 431.

years.[16/] The U.N. General Assembly has endorsed these safeguards and asked the Secretary-General "to employ his best endeavors in cases where the safeguards . . . are violated."[17/] In September 1985, the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders adopted Resolution No. 15, which endorsed the ECOSOC safeguards and urged all nations retaining the death penalty to implement those safeguards. The United States joined in the consensus on this resolution.[18/]

16/ E.S.C. Res. 1984/50, U.N. ESCOR Supp. (No. 1) at 33, U.N. Doc. E/1984/84 (1984).

17/ G.A. Resolution 39/118, U.N. Doc. A/39/51, at 211, Oper. paragraphs 2 and 5 (1984).

18/ Report of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of

(footnote cont'd)

3. National Laws and Practice

In addition to treaties, the plurality in Thompson referred to the law of various nations which still permit capital punishment. For example, according to the Court, Britain and New Zealand permit capital punishment only in limited circumstances, but never in the case of juvenile offenders. Thompson at 2696. Even in the Soviet Union, where capital punishment is available on a wider basis, the execution of juvenile offenders is prohibited. Id.

Even in the United States, laws in various jurisdictions which retain the death penalty nonetheless recognize that

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Offenders (26 August to 6 September 1985) U.N. Doc. A/Conf.121/22 at 86-87 (1985).

special considerations apply to juvenile offenders and at least twenty-one states have set a minimum age for imposition of the death penalty.[19/] The Senate has recently set a minimum age for capital punishment at 18 in a bill authorizing the death penalty for certain drug-related crimes. S. Res. 2455, 100th Cong., 2d Sess., 134 Cong. Rec. S7580, S7580 (June 10, 1988). Opposition to the execution of persons who committed crimes while under the age of eighteen is underscored by the public declarations of various prestigious

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19/ Nine have set the minimum age at 18 (including the recent addition of New Jersey, Indiana and Maryland). Twelve additional jurisdictions without a minimum age requirement expressly provide for age as one of the mitigating factors in imposing the death sentence. V. Streib, Minimum Statutory Ages for the Death Penalty (October 1, 1985) (unpublished 2memorandum).

United States legal bodies, including the American Law Institute and the American Bar Association. 20/

In addition to statutory law, Amnesty International has found that the practice of nations is not to impose the death penalty for crimes committed by persons under 18 years of age. Since 1979 over 11,000 legally-sanctioned executions have occurred, but in only 8 cases was the person under 18 at the time of the crime: three were Americans, the other executions occurred in Pakistan (2), Bangladesh,

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20/ American Law Institute Model Penal Code § 210.6(1)(d) (Proposed Official Draft, 1962); § 210.6, Comment, 1331 Official Draft and Revised Comments (1980); American Bar Association Report No. 117A, approved August 1983.

Rwanda and Barbados.[21] In a world of more than 165 countries, this statistic alone conclusively indicates an international consensus opposed to the execution of persons for crimes committed while under the age of 18.

Thus, the international community finds that execution of juvenile offenders violates accepted standards of

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21/ Brief of Amicus Curiae Amnesty International In Support of Petitioner at 6, Thompson v. Oklahoma, ___ U.S. ___, 108 S. Ct. 2687 (1988) (No. 86-6169).

The evidence of an international consensus is necessarily limited because many states prohibit capital punishment altogether as inhumane. The practice of these states should be added to those which prohibit execution of persons under 18. See, e.g., European Convention on Human Rights, Protocol No. 6, April 23, 1983, 1983 Europ. T.S. No. 114 reprinted in 22 I.L.M. 539 (1983). This protocol prohibits capital punishment; it permits no qualifications or exceptions.

decency as shown in international treaties, resolutions of organizations, and the laws and practices of states.[22/]

II. International Law Binding on the United States Prohibits the Execution of Juveniles.

International law prohibits the execution of those convicted of offenses committed prior to the age of 18. Thus, in addition to informing Eighth Amendment jurisprudence, international law, of its own force, prohibits the execution of juvenile offenders. Execution of either petitioner High or Wilkins will expressly

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22/ See, e.g., Anglo Norwegian Fisheries Case (U.K. v. Nor.) 1951 I.C.J. 116 (Judgment of Dec. 18) (for a discussion of customary international law sources); see also U.S. v. LaJeune Eugenie, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551); Restatement (Third) of the Foreign Relations Law of the United States § 102 (1987).

violate a rule of United States law and would thereby violate an obligation the United States owes to other nations.

A. International Law is Part of United States Law.

International law is part of the domestic law of the United States. This fact has been reiterated by this Court innumerable times, most notably in the words of Justice Gray in The Paquete Habana:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves

> peculiarly well acquainted with the subjects of which they treat.

The Paquete Habana, 175 U.S. 677, 700 (1899). Justice Gray's words have recently been restated as the contemporary law of the United States in the Restatement (Third) of American Foreign Relations Law § 111(1) (1987) ("Restatement"):

> International law and international agreements of the United States are law of the United States and supreme over the law of the several States [of the Union].

The Restatement explains that treaties are expressly held to be superior to state law by the Constitution, Article VI, § 2, and that customary international law, as part of federal law, is also superior to state law. See id. § 111, Comment d. Therefore, to the extent that either Missouri or Georgia law is contrary

to international law, it also violates the Supremacy Clause of the Constitution.

B. The United States Has Signed and May Not Undermine Treaties Prohibiting Juvenile Capital Punishment.

International law is found primarily in treaties and customary international law. See Statute of the International Court of Justice, art. 38(1); Restatement § 102. Both treaties and customary international law binding on the United States prohibit capital punishment of persons who were under the age of 18 at the time of the offense.

Treaties are often the clearest, most unequivocal source of particular international law rules binding on the United States. That is so in the case at bar. As discussed above, the United States is signatory to two treaties which

expressly obligate the United States not to execute petitioners, the International Covenant on Civil and Political Rights and the American Convention on Human Rights.[23/] The United States has signed, but not ratified, both conventions. Nevertheless, this country is bound by the articles prohibiting juvenile capital punishment in both treaties. Not only has the United States not made a reservation to either article, the United States recognizes the authority of the Vienna Convention on the Law of Treaties[24/] which

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23/ See supra, Part I.C. 1, pp. 20-26.

24/ See Letter of Submittal to the President, S. Exec. Doc. L., 92d Cong., 1st Sess. 1 (1971). see also Interpretation of Treaties, 75 Am. J. Int'l. Law 147 (1981); International Law Commission, Report to the General Assembly (1966), 2 Ybk. Int'l. Comm'n 172, 202; McNair, The Law of

(footnote cont'd)

prevents the United States from undermining the object and purpose of a treaty this country has signed, even before ratification. Article 18 of the Vienna Convention provides:

> [A] state is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
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> a. it has signed the treaty . . . subject to ratification . . . until it shall have made its intention clear not to become a party to the treaty.

Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 (1969) reprinted in 8 I.L.M. 679, 686 (1969).

To execute a juvenile offender in violation of either the International

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Treaties (1961) at 199; Anzilotti, Cours de Droit International (Gidel trans. (1929)) at 372.

Covenant on Civil and Political Rights or the American Convention on Human Rights would plainly defeat the object and purpose of the articles prohibiting juvenile execution. Any sentence of death in violation of either of these Conventions should be stayed until, in the words of the Vienna Convention, the United States has "made its intention clear not to become a party to the treaty." Id. To date, the United States has manifested no such intention.

The Restatement (Third) of the Foreign Relations Law of the United States incorporates Article 18 of the Vienna Convention into § 312(3). As an example of an act that would "defeat the object and purpose" of a treaty, the Restatement discusses a test of a new nuclear weapon in contravention of a provision

prohibiting such tests in a signed, but unratified treaty. The effects of such a test, which would release significant radioactivity into the atmosphere, would be irreversible, since the atmospheric contamination could not be called back. Since the injury is irreversible, the Restatement concludes, such an act would defeat the object and purpose of the treaty in the sense forbidden by the Vienna Convention and customary international law.

Similarly, a life taken by execution is irretrievable. If the United States permits the execution of a juvenile offender, the purpose and object of the signed, but unratified human rights conventions would be defeated in the sense proscribed by the Vienna Convention and the Restatement. Thus, legal obligations

binding on the United States would be breached.

C. Customary International Law Binding on the United States Also Prohibits Juvenile Executions.

Even if the United States withdrew its signature from the International Covenant on Civil and Political Rights and the American Convention on Human Rights, it would still be bound by customary international law which now prohibits capital punishment of persons for crimes committed when they were under age 18. "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement § 102(2).

As discussed above,[25] treaties, resolutions of international organizations, and the laws of nations clearly show that international law now prohibits capital punishment of persons who commit crimes while under the age of 18. Thus, widely ratified human rights treaties, resolutions of international organizations, and the practice of nations provide compelling evidence that the imposition of the death penalty upon juvenile offenders rises to the level of a customary rule of international law.

CONCLUSION

Based on the foregoing, this Court should invalidate the death penalty statutes of Georgia and Missouri which

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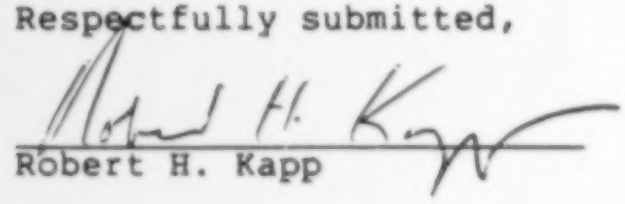
25/ See supra Part I.C., pp. 19-33.

permit the execution of persons for crimes committed prior to age 18 as violations of international law and the Eighth Amendment to the Constitution.

Respectfully submitted,



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